IN THE

Supreme Court of the United States

October Term, 1957

No. 165

In the Matter of the Application of
MAX LERNER,

Appellant,

For an Order Under Article 78 of the Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees,

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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The appellees have moved to dismiss the appeal herein upon two grounds: (1) absence of a substantial federal question, and (2) failure *in part* to raise the federal questions in the courts below.

I.

Appellees are in error on both points. This appears from the majority and dissenting opinions in the two appellate courts below. It will be shown further by refer-

ences to the record and to appellant's briefs. Finally, a motion to dismiss an appeal does not lie unless *no* substantial federal issues were presented below.

For the convenience of the Court, we set forth at this point the federal questions recited in the Notice of Appeal:

> 1. Whether the dismissal from public employment of a subway conductor with tenure contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States where such dismissal is upon the ground that he is a security risk, the sole evidence thereof being his invocation of his constitutional privilege against self-incrimination.
>
> 2. Whether the dismissal of the said employee for "Activities * * * which give reasonable ground for belief that he is not a good security risk," contravenes the due process clause of the Fourteenth Amendment, where he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the activities.
>
> 3. Whether the discharge of a subway conductor for membership in the Communist Party violates his right to freedom of speech, assembly and association under the Fourteenth Amendment to the Constitution of the United States when such membership is at most inferred from his invocation of the constitutional privilege and scienter is not charged.
>
> 4. Whether the appellant's privilege against self-incrimination under the Fifth Amendment to the United States Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted his constitutional privilege in a proceeding conducted by state authorities in pursuance of the federal government's security program.
>
> 5. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I,

§ 6, is not so restrictive and inconsistent with that court's liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny the appellant the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

6. Whether the determination that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when the making of such determination was without notice to appellant and without evidence or hearing, and, further, was arbitrary and unreasonable in view of the nature of his duties.

7. Whether the appellant has not been denied due process under the Fourteenth Amendment to the United States Constitution when he was discharged from employment as a subway conductor by the New York City Transit Authority upon the basis of findings, *inter alia*, that the Communist Party was a "subversive organization" and that the New York City Transit Authority was a "security agency" within the meaning of the Security Risk Law, N. Y. Laws 1951, c. 233 as amended, when he was not a party to any proceeding making such findings and was not afforded, under the said statute, any opportunity to challenge such findings.

It will be shown below that each raises a substantial question, that the first six such points were squarely raised and decided in the state courts and the last one necessarily comprehended within the due process claims asserted by appellant and decided adversely to him by the state courts. (See *Dewey* v. *City of Des Moines*, 173 U. S. 193, 198).

II.

The basic issue presented by this appeal is whether appellant's dismissal upon the ground that he is a security risk contravenes the due process clause of the Fourteenth Amendment where the sole evidence against him was his

invocation of the constitutional privilege. This issue was squarely raised and passed upon in all the three state courts (fols.[1] 40, 45, 47; 79-41, 148-228; Juris. State.,[2] App.[3] p. 25).

One judge in the Appellate Division and two judges in the Court of Appeals agreed with appellant that he had been denied such due process (fols. 215, 227, Juris. State. pp. 41, 43-44, 48). This view has since been confirmed by this Court's decision in *Konigsberg* v. *California*, 77 S. Ct. 722, 732, where it said:

> "The State argues that Konigsberg's refusal to tell the Examiners whether he was a member of the Communist Party or whether he had associated with persons who were members of that party or groups which were allegedly Communist dominated tends to support an inference that he is a member of the Communist Party and therefore a person of bad moral character. We find it unnecessary to decide if Konigsberg's constitutional objections to the Committee's questions were well founded. Prior decisions by this Court indicate that his claim that the questions were improper was not frivolous and we find nothing in the record which indicates that his position was not taken in good faith. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted."

citing *Slochower* v. *Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944, and other cases in-

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[1] "fols." refer to the certified transcript of Record filed with this Court when the case was docketed.

[2] "Juris. State." refers to the Jurisdictional Statement.

[3] "App." refers to the Appendix to the Jurisdictional Statement.

volving the constitutional privilege against self-incrimination.

This Court's recent grant of certiorari in *Board of Public Education, School District of Philadelphia* v. *Herman Beilan*, No. 668, Oct. Term, 1956, requires the denial of the appellees' motion herein. Beilan was discharged for refusing to answer his employer's questions as to membership in the Communist Political Association. He asserted that the employer was required to produce evidence of wrongdoing under the Pennsylvania Loyalty Act. The Board of Public Education, in opposing certiorari, argued in this Court that Beilan was discharged not for disloyalty but for refusal to carry out his duty to answer questions pertinent to his duties (Brief for Respondent in Opposition, p. 6). The due process issue herein is the same as in *Beilan*. The discretionary grant of certiorari in *Beilan* makes it clear that a substantial federal question is raised herein.

Appellees seek to distinguish this Court's decision in the *Konigsberg* case on three grounds: (1) that appellant was warned of the consequences of his refusal; (2) that his work as a subway conductor was important to national security and (3) that the Communist Party had been "listed as a subversive organization" (Motion,[4] p. 5).

The first ground is relevant to only one part of the *Konigsberg* decision. It has no bearing upon the second principle set forth in that case: the irrationality under the due process clause of an inference of wrongdoing or bad character from a refusal to answer (77 S. Ct. at 732). Appellees inaccurately assert that no such inference was drawn below (Motion, p. 4). On the contrary, appellant could only be discharged under the statute if his refusal to answer was evidence of unreliability (Security Risk Law, App., pp. 17-24). Such a finding was made by appellees

[4] "Motion" refers to appellees' motion to dismiss the appeal, to which this brief is addressed.

(fols. 50-51, 65) and by the Courts below (fols. 109, 115, 169, 199, 209, App., pp. 35-36).

The second and third distinctions urged by appellees are irrelevant to the due process issue. Surely a higher degree of probity is not required of a subway conductor with tenure than of an applicant for admission to the Bar. Nor are California's views with respect to the Communist Party different from those of New York. (See *e.g.*, *Black* v. *Cutter Laboratories*, 43 Cal. 2d 788, writ dismissed, 351 U. S. 292.) Finally, New York in its treatment of appellant was as indifferent to the *scienter* doctrine of *Wieman* v. *Updegraff*, 344 U. S. 183, as was New Mexico in *Schware* v. *Board of Examiners*, 77 S. Ct. 752, and California in the *Konigsberg* case.

Three judges in the courts below were of the opinion that this Court's decision in *Slochower* v. *Board of Education*, 350 U. S. 551, required a decision in favor of appellant. The appellees seek to distinguish *Slochower* on these grounds: (1) that the inquiry here was as to present as well as past membership; (2) that the discharge was not automatic because appellees "reached a conclusion stemming from the particular facts * * *" and (3) that the Commissioner of Investigation before whom the privilege was asserted was "an authorized agent" of appellees (Motion, p. 5).

Noting these points *seriatim*: First, this Court's remark in *Slochower* concerning present membership was incidental to the principal theme of the case. This view is corroborated by the *Konigsberg* decision, which did involve a refusal to discuss present membership. Second, the discharge here was in fact "automatic" as indicated by: (1) the unequivocal finding herein of unreliability by reason of the assertion of privilege; (2) appellees' consistent record of discharging employees under the Security Risk Law for refusing to answer political questions (see, also, *Hehir* v. *The New York City Transit Authority*

(N. Y. Sup. Ct., Kings Cty., Index No. 4071, 1956), still pending) regardless of the period covered by the employee's refusal to testify. Finally appellant does not concede that the Commissioner was appellees' agent; this point, however, is not material to the due process issue.

III.

Appellees argue next that appellant's failure to appeal to the State Civil Service Commission before instituting this law-suit eliminates any substantial federal question as to *procedural* due process (Motion, pp. 3-4).

This argument is limited to the procedural due process questions set forth in the Notice of Appeal, Questions 2, 6 and 7. It has no bearing upon: Questions 1 (substantive due process); 3 (freedom of speech, assembly, and political association); 4 (federal self-incrimination and immunities and privileges), or 5 (equal protection).

The argument is without merit with respect to the various aspects of procedural due process represented by Questions 2, 6 and 7. The proper method of raising federal questions is a matter of state practice. *Parker* v. *Illinois*, 333 U. S. 571. The New York courts have resolved these issues in favor of appellant.

Thus, the lowest court expressly held that appellant was not required to appeal to the Civil Service Commission in his attack upon the constitutionality of state statute as written or applied (fol. 122). It said:

> "* * * Indeed, section 1106 expressly provides that 'the decision of the Commission shall be final and conclusive and not subject to review by any court.' So, to be consistent, the fact of validity of the statute would ordinarily require the petitioner to complete his statutory remedy by appealing to that body (People ex rel. Walrath v. O'Brien, 112 App. Div., 97). But the grounds for review do include the heretofore undetermined question of constitution-

> ality of the statute whose sanctions are applied against the petitioner. In the absence of decisional law as to its constitutionality, he is justified in addressing himself to the court despite its provisions for final and conclusive determination by the State Civil Service Commission."

An appeal to the Civil Service Commission was unnecessary and meaningless.[5] There was no dispute with respect to the critical fact—the assertion of the privilege. The Commission was not competent to adjudicate the constitutional problems raised by the appellant. Further, the Commission's designation of the Transit Authority as a security agency was made without hearing (see App. 43, ftn. 2); and in no proceedings before it under the Security Risk Law has it ever seen fit to reopen the issue or to justify the designation by evidence (see, *e.g.*, *Hehir* case, *supra*).

It would have been equally futile to seek to litigate before the Commission the issue of whether the Communist Party is a subversive organization. For the Commission, acting under Section 8 of the statute, adopts designations made by the State Board of Regents. That Board designated the Communist Party as subversive. Further, the Court of Appeals made its own evaluation of the Communist Party by a process analogous to judicial notice (App. 37-38).

Under New York practice litigants are frequently given a choice by the courts, even in the absence of statutory provision and even in matters not involving constitutional issues—of choosing between an appeal to an administrative body and a suit in the courts. *Cottrell* v. *Board of Education*, 181 Misc. 645, affirmed 267 App. Div. 817, affirmed 293 N. Y. 792, 59 N. E. 2d 32; *Matter of O'Connor* v. *Emer-*

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[5] It might even have jeopardized appellant's rights, since the statutory method makes Commission action "final and conclusive and * * * not subject to review in any court" (§ 6, App. 22).

son, 196 App. Div. 807, affirmed 232 N. Y. 561, 134 N. E. 572; *Matter of Citron* v. *O'Shea*, 244 App. Div. 158.

The opinion of the Court of Appeals makes no critical reference to appellant's choice of the judicial, rather than the administrative forum (App., pp. 25-41). The Court did not decline to adjudicate any of the issues raised by reason of this choice. Therefore, appellees may not ask this Court to decide differently this purely procedural aspect of State law.

IV.

Appellees argue finally that appellant's questions 6 and 7 were not presented to the courts below (Motion, p. 6). Since appellees by this limited attack concede that questions 1 through 5 were presented to the state courts, the failure—if failure there was—to present two other questions would not justify the present motion. At most, it might persuade this Court after hearing the appeal to decline adjudication upon the issues not directly presented to the state courts.

However, appellees are incorrect on the facts and their single reference to appellant's principal brief in the Court of Appeals is incomplete (Motion, p. 6). In Questions 6 and 7, appellant asserts that he was denied due process by three determinations below that (a) his work involved national security, (b) the Transit Authority was a security agency and (c) the Communist Party was a subversive organization, because he was not a party to the proceedings in which such determinations were made. Appellant also challenges as arbitrary and unreasonable the said designation of his work as involving national security.

These contentions are sufficiently comprehended by appellant's claims in the three courts below and by the three decisions holding that appellant was not denied procedural due process. Thus appellant's first pleading, his petition in the State Supreme Court, asserted that "the

Security Risk Law is unconstitutional in that as written and as applied it is inconsistent with procedural due process" (fol. 45); this claim was explicitly decided against him by the lowest state court (fols. 99-100).

In the Court of Appeals, appellant's second point in his principal brief raised substantive and procedural due process claims under the following heading:

POINT II

> "THE STATUTE AS CONSTRUED AND APPLIED VIOLATES APPELLANT'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE HE WAS DISCHARGED FOR INVOCATION OF HIS CONSTITUTIONAL PRIVILEGE RATHER THAN UPON CHARGES AND EVIDENCE OF WRONGDOING." (Brief, p. 13).

More specifically, appellant stated *inter alia*:

> "Appellant was obviously not given a fair trial, that is, one which would meet the procedural requirements of due process. These include: reasonable notice of the discharges, *In re Oliver*, 333 U. S. 257; *United States* v. *Cruikshank*, 92 U. S. 542, 558; the right to a hearing, *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177; *Morgan* v. *United States*, 304 U. S. 1; *Palko* v. *Connecticut*, 302 U. S. 319, 327; an opportunity to examine the evidence and to cross-examine witnesses supporting the charges, to offer testimony on one's own behalf, and to be represented by counsel, *In re Oliver, supra; Motes* v. *United States*, 178 U. S. 458, 467, 471; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93" (Brief, pp. 16, 17).

Copies of appellant's principal and reply briefs in the New York Court of Appeals have been filed with this Court.

Appellant also argued in his third point that

POINT III

> "A DISCHARGE FOR POLITICAL REASONS, IF IT CAN BE JUSTIFIED AT ALL, IS CONSTITUTIONAL ONLY IN THE EVENT OF A SERIOUS EMERGENCY REQUIRING SUCH ACTION. SUCH AN EMERGENCY DOES NOT EXIST HERE." (Brief, p. 18.)

Appellant pointed out *inter alia* that the Security Risk Law does not require *scienter* and that it

> "does not even require the Commission to base its findings upon evidence developed in hearings conducted by it but permits the incorporation of 'findings' made by other agencies, state and federal (§ 1108)" (Brief, p. 18).

Appellant likewise challenged the claim that he was in "a sensitive position" (Brief, p. 21) and added:

> "Nevertheless, the State Civil Service Commission, *without any hearing known to appellant*, defined the Transit Authority as a security agency, thereby subjecting to the Security Risk Law every employee in that agency regardless of the nature of his duties" (italics added) (Brief, p. 21).

The Court of Appeals decided Question 6 by holding as a matter of law:

> "The Transit Authority performs a function necessary to the security or defense of the nation and state" (App., p. 33).

The Court of Appeals also ruled upon appellant's claim that the designation without hearing of the Transit Authority as a security agency was improper (Question 6). It said that "the Transit Authority has been properly denominated a 'security agency'" (App., p. 34). It expressly declared "untenable" appellant's claim that "no emergency could conceivably justify the dismissal of the petition because his position as a conductor could have no national connection with national security" (App., p. 37).

The only procedural due process issue posed by appellant upon which the Court of Appeals did not rule was the claim that the designation of the Communist Party was not made in a proceeding to which appellant was a party. Appellant had raised this issue in the Court of Appeals by pointing out that the statute authorizes the Commission to make such designations without any hearings (Brief, p. 5).

The failure of the Court of Appeals to rule expressly upon this particular aspect of the due process issue cannot prejudice appellant. In any event, this facet of the case, while important, is incidental to the main ones discussed above and directly ruled upon by the Court of Appeals.

CONCLUSION

Appellees' motion to dismiss the appeal or affirm the judgment and decrees of the New York courts should be denied.

Dated: New York, N. Y., July 17, 1957.

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